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The Delaware Carve-Out's Carve: Examining and Repairing SLUSA's State Law Exception

Kenneth Hsu *

I. INTRODUCTION

In the aftermath of the stock market crash of 1929 and subsequent Great Depression, Congress responded by venturing into territory previously regulated by the states: securities law.¹ Concerned that state “blue sky” laws² alone were inadequate to police transactions involving nationally traded securities, Congress enacted the Securities Act of 1933 (“1933 Act”)³ and the Securities Exchange Act of 1934 (“1934 Act”),⁴ a massive body of legislation that continues to anchor securities regulation today.⁵ The acts spawned decades of legislation intended to promote confidence in national markets while encouraging the investment necessary to stimulate the economy.⁶ In doing so, Congress mandated a myriad of securities-related disclosures from issuers and provided relief to investors harmed by securities fraud, including the general antifraud

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1. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) (“In response to the sudden and disastrous collapse in prices of listed stocks in 1929, and the Great Depression that followed, Congress enacted the Securities Act of 1933 . . . and the Securities Exchange Act of 1934.”).

2. Like their federal counterparts, state “blue sky” securities laws generally regulate the offering and sale of securities to protect investors from fraud.

3. Securities Act of 1933, 15 U.S.C. §§ 77a–77b (2014).

4. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78p (2014).

5. See *Dabit*, 547 U.S. at 78; Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 280–81 (1998).

6. See S. REP. NO. 104-98, at 4 (1995).

provision of Section 10(b), the eventual centerpiece of most federal securities fraud litigation today.⁷ Especially after the advent of class action lawsuits in federal civil procedure, these securities laws empowered investors with causes of action to hold issuers accountable for fraudulent practices.⁸

Sixty years later, Congress contemplated another advancement into state law when it enacted the Securities Litigation Uniform Standards Act of 1996 ("SLUSA").⁹ This time, perhaps ironically, Congress was intent on *inhibiting* the use of class actions to allege securities fraud. Long past the panic of the 1930s, Congress was now sympathetic to companies complaining about litigating baseless "strike suits" and paying extortionate settlements to opportunistic plaintiffs.¹⁰ Congress was alerted to the chilling effect such litigation had on corporate disclosures, hindering the type of capital formation securities law was intended to promote.¹¹ To remedy these burdens, the Private Securities Litigation Reform Act of 1995 ("the PSLRA")¹² imposed heightened pleading standards and discovery restrictions, among other new rules, on securities fraud class action plaintiffs.¹³ After loopholes within the PSLRA were quickly exposed, Congress went a step further by enacting SLUSA.¹⁴ SLUSA's most important—and controversial—provisions precluded certain *state* law securities-related claims from being brought as class actions altogether.¹⁵

Unsurprisingly, SLUSA's denial of the class action vehicle for state law causes of action invited sensitive federalism questions.¹⁶ The

7. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196–97 (1976).

8. See Perino, *supra* note 5, at 283–84.

9. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

10. See *Dabit*, 547 U.S. at 81. See also Perino, *supra* note 5, at 290–92 (1998).

11. See S. REP. NO. 105-182, at 4 (1998).

12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

13. See discussion *infra* Part II.A.

14. See *Dabit*, 547 U.S. at 82.

15. See discussion *infra* Part II.B.

16. See Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 477 (2002) ("[SLUSA] would also prohibit the states from regulating

transactions and events being litigated by these precluded actions typically involved conduct also regulated by corporate law, a realm traditionally reserved to the states—most notably, Delaware.¹⁷ Would SLUSA preclude some state corporate law claims altogether as well? If so, did SLUSA signify an erosion of state control of corporate regulation?

Mindful of these issues, Congress decided *not* to break new ground. Instead, it included within SLUSA a clause that became popularly known as the “Delaware carve-out.”¹⁸ In short, the carve-out is a carefully written savings clause that preserves state law claims that would otherwise be dismissible under SLUSA preclusion.¹⁹ In spite of the obvious regulatory overlap between federal securities law and state corporate law, federal lawmakers delicately avoided interfering with the latter since the Depression.²⁰ The carve-out was designed to continue this trend.

Legislative history surrounding the carve-out suggests that Congress was particularly concerned about the overlap between the causes of action for securities fraud under federal law and for breach of the fiduciary duty to disclose under state common law.²¹ To ensure that SLUSA would not preclude an important state law cause of action, Congress codified the then-existing fiduciary duty to disclose under Delaware law and “carved out” any such claims from SLUSA preclusion.²² The carve-out therefore symbolizes a small portion of the long respected border between federal securities law and state corporate law.²³ In practical terms, the carve-out is an invaluable opportunity for class action plaintiffs to litigate claims that would

certain behavior of directors, creating a significant federalism issue.”); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 65–71 (1998) (explaining “dual-forum class action framework” between federal securities law and state corporate law).

17. See S. REP. NO. 105-182, at 6 (1998).

18. See discussion *infra* Part II.C.

19. See 15 U.S.C. § 77p(d)(1)(A)–(B) (1998).

20. See O’Hare, *supra* note 16, at 501 (“Just as Delaware courts have sought to respect the anti-fraud provisions of the federal securities laws, Congress has attempted to respect state corporate law.”).

21. *Id.* at 502–03.

22. *Id.* at 504.

23. *Id.* at 501.

otherwise be dismissed by SLUSA. For defendants, the carve-out is a dangerous hole in the PSLRA and SLUSA's shield from such litigation.

The carve-out's broad statutory language, however, does not provide much clarity for parties litigating its applicability. While three circuit level opinions have addressed particular portions of the carve-out's text, none have offered a controlling understanding of the statute.²⁴ The carve-out's precise scope instead remains largely defined by an assortment of lower court decisions relying on different interpretations of the statutory language and of related case law.²⁵ Amid such uncertainty, this note seeks to discern some clarity to the carve-out's reach and evaluate its effectiveness.

Part II of this note details the evolution of federal securities regulation since the Depression, highlighting Congress's expansion and eventual reining in of private securities fraud class action litigation. These trends not only provide the backdrop to the note's findings, but also shed light on Congress's reasons for enacting SLUSA.

Part III investigates how lower courts have interpreted the carve-out since its passage. This analysis is informed by an extensive survey of case law construing the carve-out's text. By dividing the carve-out into four core prongs, this note illustrates how certain portions of its statutory language have determined its influence on securities class action litigation after SLUSA.

Finally, Part IV argues that courts interpreting the carve-out should be more cautious of preempting state law causes of action. The note explains how the carve-out quickly became outdated and suggests that the federal courts compensate by deferring more to their state counterparts. This assertion is also informed by recent federal case law addressing the carve-out's reach and, more broadly, the limits on securities class actions under SLUSA.

24. See *Campbell v. Am. Int'l Grp., Inc.*, 760 F.3d 62 (D.C. Cir. 2014); *Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549 (6th Cir. 2011); *Madden v. Cowen & Co.*, 576 F.3d 957 (9th Cir. 2009).

25. See cases cited *infra* Part III.

II. BACKGROUND: SECURITIES FRAUD CLASS ACTION LITIGATION BEFORE THE CARVE-OUT

A. SECTION 10(B)/RULE 10B-5

Congress has historically responded to market abuses and failures by increasingly regulating the sales of securities. Prior to 1933, states equipped with “blue sky” laws were the sole regulators of securities transactions.²⁶ However, without jurisdiction over transactions that occurred past state lines, these statutes were generally perceived as ineffective in protecting investors from widespread securities fraud.²⁷ In the wake of the Great Depression, Congress filled the regulatory vacuum by enacting both the 1933 Act and 1934 Act “to heighten fiduciary obligations in securities transactions in order to restore public confidence in the nation’s financial market.”²⁸ Arguably the most important provision from these two acts, Section 10(b) (“§ 10(b)”) of the 1934 Act empowered the Securities and Exchange Commission (“SEC”) to promulgate anti-fraud rules preventing the use of fraudulent or deceptive devices “in connection with the purchase or sale of any security.”²⁹ The SEC promulgated Rule 10b-5 (“10b-5”), the “catchall” antifraud provision used to police most securities fraud today.

In recent decades, Congress and the federal courts have reined in private rights of action under § 10(b) and 10b-5.³⁰ Notably, in *Blue Chip Stamps v. Manor Drug Stores*, the Court foreshadowed

26. See Painter, *supra* note 16, at 21 (describing the history of state “blue sky” laws).

27. *Id.* at 22–23.

28. Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1066–67 (1999) (citing H.R. REP. NO. 73-85, at 1 (1933)). See also Painter, *supra* note 16, at 23–25.

29. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2014).

30. See Ramirez, *supra* note 28, at 1071–72 (“Although the Court has continued to interpret the federal securities laws broadly in areas dominated by public enforcement action, it recently has expressed little support for private enforcement of the federal securities laws.”); Joshua D. Ratner, *Stockholders’ Holding Claim Class Actions Under State Law After the Uniform Standards Act of 1998*, 68 U. CHI. L. REV. 1035, 1045 (2001) (“In recent decades, the federal judiciary has taken a more negative view of private securities suits . . .”).

Congressional concern when it warned about the dangers of allowing unlimited § 10(b) and 10b-5 standing for class actions, namely the “widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.”³¹ The Court recognized a need to protect companies against floods of meritless “strike suits” brought merely to obtain a settlement.³² By the 1990s, these same policy considerations persuaded Congress to step in and effectively alter the rule governing class actions alleging securities fraud.

B. THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

Congress echoed the Supreme Court’s policy concerns in *Blue Chip Stamps* when it passed the Private Securities Litigation Reform Act of 1995 (“PSLRA”)³³ to protect companies against meritless class action litigation.³⁴ The PSLRA’s legislative history identifies three problems that the act was intended to remedy. First, it was too easy for “professional plaintiffs” to craft securities fraud claims in federal court, even if their claims were frivolous or baseless.³⁵ As a Senate Banking Committee report noted, “[a] drop in a public company’s stock price, a failed product development project, or even unpredictable adverse market conditions that affect earnings results for a quarter can trigger numerous securities fraud lawsuits against a company.”³⁶ Secondly, even if a lawsuit’s claims were deficient, the costs of litigating against a securities-related class action—particularly in discovery—often coerced companies into large settlements well before a court would consider the claims’ merits.³⁷ Finally, the mere

31. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

32. *Id.* at 740.

33. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

34. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 122 (2d Cir. 2003) (describing the PSLRA as “a demonstrably unavailing attempt by Congress . . . to ‘prevent strike suits,’ described as ‘meritless class actions that allege fraud in the sale of securities.’”) (citations omitted).

35. *See S. REP. NO. 104-98*, at 9 (1998). For a detailed explanation of the Congressional debate surrounding the passage of the PSLRA, *see Perino, supra* note 5, at 290–91.

36. *S. REP. NO. 104-98*, at 8 (1998).

37. *See id.* at 9 (“Of the approximately 300 securities lawsuits filed each year, almost 93

threat of class action litigation chilled companies from disclosing forward-looking information that could potentially be construed as inaccurate.³⁸ Congress found such disclosure to be crucial for everyday investment decisions and, more generally, for large-scale capital formation.³⁹

To remedy these problems, the PSLRA established numerous procedural hurdles for securities fraud class actions plaintiffs. These new requirements included the following: (i) heightened pleading requirements,⁴⁰ (ii) a mandatory stay of discovery pending motions to dismiss,⁴¹ and (iii) safe harbor provisions for “forward-looking” statements.⁴² The PSLRA thus added a subset of rules to the Federal Rules of Civil Procedure that applied solely to private securities fraud class action litigants.⁴³

1. *The PSLRA’s “Federal Flight Loophole”*

While the PSLRA’s new requirements were sweeping, the number of securities fraud class actions in the wake of the PSLRA did not decline as expected.⁴⁴ Congress found an obvious explanation within the PSLRA itself, namely, that it applied to litigants in the *federal* forum only.⁴⁵ By solely targeting plaintiffs in federal court, the PSLRA inadvertently created incentives to sue in state court.⁴⁶ Crafty plaintiffs’ attorneys circumvented the PSLRA’s requirements by simply filing actions under state law causes of action (e.g., common

settle at an average settlement cost of \$8.6 million. These cases are generally settled based not on the merits but on the size of the defendant’s pocketbook.”).

38. See Perino, *supra* note 5, at 292.

39. *Id.*

40. 15 U.S.C. § 78u-4(b)(1)–(2) (2014).

41. *Id.* at § 78u-4(b)(3).

42. *Id.* at § 77z-2.

43. See Perino, *supra* note 5, at 292 (“[T]he [PSLRA] creates a separate subset of the Federal Rules of Civil Procedure that applies only to securities fraud cases.”); see also John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 995–96 (1996) (discussing the PSLRA’s impact on motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure).

44. See Perino, *supra* note 5, at 299–300 (examining three different studies that surveyed post-PSLRA litigation data).

45. *Dabit*, 547 U.S. at 82.

46. See Perino, *supra* note 5, at 292–93.

law fraud), often in state court, if the facts would not survive the PSLRA's more stringent requirements.⁴⁷ In other instances, plaintiffs would bring parallel federal and state law claims, enabling them to avoid the PSLRA's defendant friendly discovery provisions while taking advantage of more liberal state discovery rules.⁴⁸ These strategies produced an increase of class action litigation involving nationally traded securities in state court, which was rare prior to the PSLRA's passage.⁴⁹

Congress quickly became concerned that the "federal flight loophole" was frustrating the PSLRA's initial objectives.⁵⁰ The pre-PSLRA threat of litigating "strike suits" may have been phased out, but it was quickly replaced by the risk of litigation in state court.⁵¹ This time, however, potential litigation exposed issuers to unfamiliar federalism issues that securities law had struggled with for decades. Issuers of nationally traded securities potentially faced liability in multiple states, each with differing laws and procedures.⁵² In one Congressional testimony, a state securities regulator remarked that, under the then-existing regulatory scheme, "a single state can impose the risks and costs of its peculiar litigation system on all national issuers."⁵³ With compelling evidence, Congress was once again concerned about the impact class action litigation—now in state

47. *Id.* ("Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court.").

48. S. REP. NO. 105-182, at 3 (1995).

49. *Dabit*, 547 U.S. at 82. ("The evidence presented to Congress . . . to evaluate the effects of the Reform Act suggested that this phenomenon was a novel one; state-court litigation of class actions involving nationally traded securities had previously been rare."); H.R. REP. NO. 105-803, at 14 (1998) (Conf. Rep.) ("Prior to the passage of the Reform Act, there was essentially no significant securities class action litigation brought in State court."). *See also* Perino, *supra* note 5, at 298-301 (detailing empirical evidence suggesting an increase in the number of class actions filed solely in state court in years after PSLRA's passage). California was an especially crucial and popular state for post-PSLRA securities fraud litigation. For a retrospective discussion of the post-PSLRA trends in California securities litigation and legislation, *see* Painter, *supra* note 16, at 36-42.

50. *Spielman*, 332 F.3d at 123.

51. S. REP. NO. 105-182, at 3-4 (1995) ("[S]tate-court class actions involving nationally traded securities were virtually unknown prior to the [1995 Act]; they are brought with some frequency now.").

52. *Id.* at 3.

53. *Id.* at 5.

court—had on the country’s capital markets.⁵⁴

C. THE SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1998

1. *SLUSA Removal and Preclusion Provisions*

To curtail the migration to state court, Congress plugged the PSLRA’s “federal flight loophole” by enacting the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”).⁵⁵ Simply put, SLUSA required that certain *state law* class action claims involving nationally traded securities be brought under federal law to face the stringent pleading and procedural standards of the PSLRA. To do so, the PSLRA made “some state law claims nonactionable through the class action device in both federal and state court.”⁵⁶

SLUSA consists of two central provisions: a preclusion provision⁵⁷ and a removal provision.⁵⁸ The preclusion provision broadly bars any “covered class action”⁵⁹ based upon *state law* if the suit alleges fraud “in connection with the purchase or sale of a covered security.”⁶⁰ The term “covered security” includes securities

54. *Id.* at 4. (“This trend has created a ripple-effect that has inhibited small, high-growth companies in their efforts to raise capital, and has damaged the overall efficiency of our capital markets.”).

55. *See Dabit*, 547 U.S. at 82 (“To stem this ‘shif[t] from Federal to State court’ and ‘prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of’ the Reform Act, Congress enacted SLUSA.”) (Internal full feature citations omitted). For a detailed account of the legislative history and intense debate surrounding SLUSA’s preclusion provision, *see Painter*, *supra* note 16, at 41–60.

56. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) (emphasis added).

57. 15 U.S.C. § 77p(b) (2014). *See also Kircher*, 547 U.S. at 636 n.1 (“The preclusion provision is often called a preemption provision; [SLUSA], however, does not itself displace state law with federal law . . .”).

58. *Id.* § 77p(c).

59. For purposes of preclusion, SLUSA defines “covered class action” to mean any lawsuit in which damages are sought on behalf of more than fifty people. *See id.* § 77p(f)(2)(A).

60. *Id.* § 77p(b). The fraud alleged must be either “an untrue statement or omission of a material fact” or “any manipulative or deceptive device or contrivance.”

traded on a national exchange.⁶¹ Neither a federal nor state court has jurisdiction over an action if it is precluded by SLUSA.⁶²

To effectuate the preclusion provision, SLUSA's removal provision allows state court defendants to remove "covered class actions" to federal district court, where a judge determines (i) if the suit may validly be maintained in federal court pursuant to the removal clause, and (ii) if the suit is dismissible under SLUSA's preclusion clause or otherwise falls within an exemption to removal, such as the Delaware carve-out.⁶³

2. *SLUSA's Preemption of State Law*

Taken together, SLUSA's preclusion and removal provisions prophylactically remedy the PSLRA's shortcomings. SLUSA's immediate goal was to halt the end run around the PSLRA by precluding securities fraud class action litigation based upon state law altogether.⁶⁴ Congress thus deliberately decided that securities fraud liability would be governed by uniform *national* standards.⁶⁵ By sanctioning removal to federal court, where a federal judge determines if an action is precluded, SLUSA gives federal courts exclusive jurisdiction for virtually all class action litigation involving nationally traded securities.⁶⁶ If SLUSA preclusion applies, state law

61. *Id.* § 77p(f)(3).

62. *See Kircher*, 547 U.S. at 644.

63. 15 U.S.C. § 77bb(2)–(3). Notably, the removal provision only grants a district court removal jurisdiction in cases that are precluded under SLUSA's preclusion provision. Thus, the removal question necessarily depends on the preclusion question. *See Kircher*, 547 U.S. at 643–44. ("If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it.")

64. *See Dabit*, 547 U.S. at 82. For an extensive exploration of the reach of SLUSA preclusion, *see* Cecilia A. Glass, Note, *Sword or Shield? Setting Limits on Slusa's Ever-Growing Reach*, 63 DUKE L.J. 1337 (2014).

65. *See* H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.).

66. *See id.* ("[SLUSA] makes Federal court the exclusive venue for most securities class action lawsuits"); *see also* *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001) ("SLUSA was passed in 1998 primarily to close this loophole in PSLRA. It did this by making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law.")

is entirely displaced.⁶⁷ Class action plaintiffs lose the right to litigate state law claims in both state and federal court.⁶⁸ Even if plaintiffs choose to avoid SLUSA entirely and file a claim based upon federal law, the action will likely be dismissed under the PSLRA's stringent procedural requirements.

Nevertheless, Congress was aware that it was walking on thin ice. Congressional reports highlighted that SLUSA's preemption of state law invited sensitive federalism issues during a period in which federal courts were known to reinforce state rights.⁶⁹ The language comprising SLUSA's preclusion provision—precluding allegations of fraud “in connection with” a securities transaction—was broad enough to bar certain state law claims from ever being heard in a class action lawsuit again. Despite SLUSA's antifederalism undertones, Congress found “the interest in promoting efficient national markets to be the more convincing and compelling consideration.”⁷⁰

a. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*

Courts deciding SLUSA's applicability have regularly deferred to Congress's interest in curbing the abuses of class action securities litigation. Most notably, in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, the U.S. Supreme Court relied primarily on policy concerns when it defined SLUSA's preclusion provision broadly. The Court held that SLUSA precluded even state law claims brought by securities holders—those who neither purchased nor sold securities during the alleged fraud—even though SLUSA expressly precludes only state law claims made “in connection with the *purchase or sale* of a covered security.”⁷¹ Importantly, this same “in connection with” and “purchase or sale” language appears in § 10(b)/10b-5 and has

67. Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 ALA. L. REV. 325, 338 (2004).

68. *Id.*

69. See S. REP. NO. 105-182, at 4 (1998) (“Some critics of establishing a uniform standard of liability have attacked such legislation as being an affront on Federalism and contrary to the recent trend towards reinforcing state rights.”).

70. *Id.*

71. *Dabit*, 547 U.S. at 89.

been interpreted to *exclude* securities holders from the § 10(b)/10b-5 remedy. As such, holders of nationally traded securities have no cause of action for securities-related fraud whatsoever.

Nevertheless, the Court deferred to Congress's statutory construction and legislative intent, even after acknowledging its presumption that Congress does not "cavalierly" preempt state law.⁷² "A narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]."⁷³ After *Dabit* imposed a presumption of a broad construction of SLUSA's preclusion provision, practitioners and academics alike were unsure of exactly how far SLUSA reached into state law remedies.⁷⁴ As discussed below, the Court ultimately recognized limitations to SLUSA's preemptive scope.

3. *SLUSA's Exceptions*

Dabit also recognized the existence of several "tailored exceptions to SLUSA's pre-emptive command" as evidence in favor of a broad interpretation of SLUSA's preclusion provision.⁷⁵ These exceptions suggested that Congress offered at least some consideration of state control before preempting state law.⁷⁶ For example, SLUSA exempts from preclusion actions brought by state actors,⁷⁷ actions under contractual agreements between issuers and indenture trustees,⁷⁸ and exclusively derivative actions brought by a corporation's shareholders.⁷⁹

As a threshold matter, SLUSA precludes only those lawsuits that

72. *Id.* at 85–88.

73. *Dabit*, 547 U.S. at 89.

74. Melanie P. Goolsby, *Merrill Lynch v. Dabit: The Case of the Scorned Broker and the Death of the State Securities Fraud Class Action Suit*, 67 LA. L. REV. 227, 253 (2006).

75. *Dabit*, 547 U.S. at 87.

76. *Id.* ("The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field.").

77. 15 U.S.C. § 77p(d)(2) (2014).

78. *Id.* § 77p(d)(3).

79. *Id.* § 77p(f)(2)(B).

qualify as “covered class actions” against issuers of “covered securities,” which generally consist of nationally traded securities.⁸⁰ As such, smaller classes alleging claims involving securities traded on smaller and more localized capital markets will likely survive SLUSA.⁸¹ Arguably the most important exception to SLUSA preclusion, however, was a savings clause that preserved certain claims based upon the law of the issuer’s state of incorporation: the Delaware carve-out.

III. THE DELAWARE CARVE-OUT

A. FIDUCIARY DUTY OF DISCLOSURE UNDER DELAWARE LAW AT THE TIME OF SLUSA

The Delaware carve-out serves as a demarcation line in the inherent overlap between post-SLUSA securities law and state corporate law. At the time of SLUSA’s passage, Delaware fiduciary duty law required corporations or controlling shareholders to disclose *all material information* within their control when requesting shareholder action.⁸² For instance, early case law on the so-called “duty of disclosure” found corporate boards and control persons to be liable for inadequate disclosures in tender offers to minority shareholders,⁸³ misleading proxy solicitations,⁸⁴ and false financial statements.⁸⁵

The similarities between 10(b)/10b-5 under the 1934 Act and the duty of disclosure under Delaware law was the impetus behind the carve-out. Like securities law, corporate law also holds companies and their agents liable for making material misrepresentations or

80. *Id.* § 77p(b).

81. See O’Hare, *supra* note 67, at 339–40.

82. See Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director’s Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1089–91 (1996); Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992) (describing the duty of disclosure as the “well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board’s control when it seeks shareholder action.”).

83. Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977).

84. In re Anderson Clayton Shareholders Litig., 519 A.2d 680, 690 (Del. Ch. 1986).

85. Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998).

omissions.⁸⁶ Although corporate law traditionally regulates corporate internal affairs while securities law regulates open market disclosures, the same facts that give rise to a securities fraud claim could also give rise to a breach of fiduciary duty claim.⁸⁷

Recognizing this commonality, Delaware courts for decades minimized potential conflicts between the causes of action for securities fraud and breach of fiduciary duty.⁸⁸ For instance, Delaware cases often crafted the duty of candor to only require disclosures that were already mandated under federal law.⁸⁹ Delaware courts also limited the duty of candor's general applicability, consistently finding that the duty only applied when a director or officer requested shareholder action.⁹⁰ As discussed later, however, the Delaware Supreme Court disrupted these trends with a surprising decision in 1998.

B. THE PURPOSE OF THE CARVE-OUT

Congress also was swayed to adopt a similar deferential approach and preserve the bifurcation of corporate and securities regulation. There were several benefits to reserving corporate law—especially the fiduciary duty of candor—to the states.⁹¹ First, plaintiffs were accustomed to bringing lawsuits against directors and officers under state law. Bringing claims for breach of the fiduciary duty of candor were generally more attractive for plaintiffs as

86. See O'Hare, *supra* note 16, at 494.

87. *Id.* ("For example, assume that a company is making a self-tender for its outstanding common stock. After the tender offer has been completed, it is discovered that the company's tender offer materials contained material misstatements or omissions. Because the company's communications were materially false, a shareholder could bring an action for breach of fiduciary duty of disclosure. In addition, because the misleading tender offer materials constituted a material misrepresentation in connection with the purchase and sale of a security, the shareholder could also potentially bring an action under Rule 10b-5 of the federal securities laws.").

88. See O'Hare, *supra* note 16, at 495–501 (listing and analyzing numerous attempts by the Delaware courts to respect the anti-fraud provisions of federal securities law).

89. See Hamermesh, *supra* note 82, at 1129–30.

90. *Id.* at 1130.

91. See Painter, *supra* note 16, at 65–67.

compared to 10(b)/10b-5 claims.⁹² To recover, plaintiffs only needed to show that a corporate actor made a material misrepresentation or omission.⁹³ Plaintiffs did not need to establish reliance, causation, scienter, or proof of actual damages, as is required in a standard 10(b)/10b-5 securities fraud claim.⁹⁴ Secondly, Congress heard extensive testimony attesting to the compelling interests state governments had in regulating corporations incorporated under their laws.⁹⁵ State courts provided judicial expertise and bodies of well developed case law, allowing for quick resolution of corporate disputes.⁹⁶ Because of these longstanding advantages, corporate stakeholders relied on state law not only to resolve disputes of corporate governance and fiduciary duties, but also to guide their everyday business decisions.⁹⁷

In light of such evidence, Congress was concerned that the advantages of state control of corporate regulation would be lost under SLUSA preclusion.⁹⁸ Many class actions for breach of the duty of disclosure would indeed qualify as “covered class actions” alleging fraud “in connection with” a covered securities transaction, which were barred under SLUSA.⁹⁹ Moreover, preempting the duty of disclosure could spawn widespread uncertainty as federal courts would effectively become the sole regulators of corporate disclosures to shareholders, a role long reserved by the state courts.¹⁰⁰ By adopting a fiduciary duty exception to SLUSA preclusion, Congress deliberately avoided such an egregious effect.¹⁰¹ A Senate committee

92. *See* O'Hare, *supra* note 16, at 493.

93. *Id.*

94. *Id.*

95. *Id.* at 501–02.

96. *See* O'Hare, *supra* note 16, at 502.

97. *Id.*

98. *See* S. REP. NO. 105-182, at 6 (1998).

99. *See* O'Hara, *supra* note 16, at 501–04.

100. *Id.* at 502.

101. *Id.* at 501–04 (quoting attorney John F. Olson's testimony to Congress, “[N]arrow tailoring of the carve-out provision matches the approach of the Delaware courts, which have refused to extend the fiduciary duty of disclosure of material information relating to an action requiring shareholder approval into a more general duty to the marketplace at large akin to that imposed by the Federal securities law decisions.”). *See also Dabit*, 547 U.S. at 87–88 (“The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions.”).

report described Congress's intent behind the carve-out:

The Committee is keenly aware of the importance of state corporate law, specifically those states that have laws that establish a fiduciary duty of disclosure. It is not the intent of the Committee in adopting this legislation to interfere with state law regarding the duties and performance of an issuer's directors or officers in connection with a purchase or sale of securities by the issuer or an affiliate from current shareholders or communicating with existing shareholders with respect to voting their shares, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.¹⁰²

To ensure litigation revolving around these types of conduct was not precluded by SLUSA, Congress looked to the one resource that could make the carve-out most effective: Delaware common law.

C. THE TEXT OF THE CARVE-OUT

To carve out the fiduciary duty of candor from SLUSA preclusion, Congress first codified the fiduciary duty of disclosure as it existed under the Delaware law.¹⁰³ The text of the carve-out, titled "Preservation of certain actions," was modeled on then-existing Delaware common law.¹⁰⁴ Under the carve-out, a class action based upon the law of the state in which the issuer is incorporated or organized may be maintained in a state or federal court¹⁰⁵ if it "involves" either:

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with

102. S. REP. NO. 105-182, at 6 (1998).

103. See O'Hare, *supra* note 16, at 503.

104. *Id.*

105. According to the Court of Appeals for the D.C. Circuit, although the carve-out states that preserved actions "may be maintained in . . . federal court," it does not independently create federal jurisdiction over any state-law class actions." *Campbell*, 760 F.3d at 64. Per *Kircher*, district courts only have removal jurisdiction over claims under SLUSA's preclusive scope and must remand claims preserved under the carve-out to state court. *Id.*

respect to the sale of securities of the issuer that—

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.¹⁰⁶

Importantly, both prongs of the carve-out (subsections (I) and (II)) require some type of transaction or communication between a corporate actor and a shareholder, as required for the fiduciary duty of candor to attach under Delaware law at the time.¹⁰⁷ As Professor Jennifer O'Hare clarified, the first prong effectively preserves class action claims brought by shareholders alleging that the defendant company was fraudulent in connection with a buy-back transaction.¹⁰⁸ The second prong preserves class action claims brought by shareholders alleging that the defendant company was fraudulent in connection with a tender offer, exchange offer, or merger.¹⁰⁹ Delaware courts had applied the duty of candor to these types of transactions for decades.¹¹⁰

Like many of the securities statutes that preceded it, the carve-out was and remains tormented by broad language that leaves room for divergent judicial interpretations. Nevertheless, the carve-out immediately altered how SLUSA would be litigated, particularly in state court. For example, a defendant facing securities fraud and breach of fiduciary duty claims under state law in state court could remove the action to federal court pursuant to SLUSA's removal provision. If the court determines that the action is covered by SLUSA's preclusion provision, the action will likely be dismissed. If the court determines that the action is preserved under the carve-out, the action will likely be remanded back to state court.¹¹¹

106. 15 U.S.C.A. § 77p(d)(1)(B) (1998). Subsections (I) and (II) have also been referred to as the first and second Delaware carve-outs, respectively.

107. See O'Hare, *supra* note 16, at 503 ("In other words, the Delaware carve-out requires a request for shareholder action to maintain a class action in state court.").

108. See O'Hare, *supra* note 16, at 503.

109. *Id.*

110. See cases cited *supra* notes 93–95.

111. Generally, SLUSA does not require the dismissal of non-precluded claims along with precluded claims. See *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1227 (9th Cir.

IV. DEFINING THE CARVE-OUT

The precise scope of the carve-out has been and continues to be refined by federal courts since SLUSA's passage in 1998. Although the carve-out was intended to serve as a tailored exception to SLUSA preclusion, its statutory language contains broad terms ripe for interpretation, both in favor of and against class action plaintiffs. Most adjudication interpreting the carve-out has occurred after the defendant removes the action from state court to federal district court pursuant to SLUSA's removal clause. At this point, plaintiffs may

move for remand and contend that their action is preserved by the carve-out, thereby removing the district court's jurisdiction.

The carve-out has only been meaningfully interpreted at the circuit level in two instances: by the Ninth Circuit in *Madden v. Cowen & Co.*¹¹² and by the Sixth Circuit in *Atkinson v. Morgan Asset Management, Inc.*¹¹³ While the Supreme Court adjudicated on the reach of SLUSA's preclusion provision in *Dabit*, the Court only briefly mentioned the carve-out as evidence indicating "congressional sensitivity" to preempting state-law causes of action.¹¹⁴

This article divides the carve-out into four core requirements grounded in its statutory text. To qualify as a "covered class action" preserved under the carve-out, an action must (1) be based upon the law of the state in which the issuer is incorporated, and (2) involve either (3) the purchase or sale of securities between the issuer (or an affiliate) and its shareholders or (4) a communication regarding the sale of the issuer's securities that is made by or on behalf of the issuer (or an affiliate) to shareholders and concerns core shareholder decisions (e.g., voting; selling; dissenting).¹¹⁵ This note analyzes each requirement individually below.

2009). In such instances, case law remains unclear on whether the court must remand the entire action or just those claims it finds to be preserved by the carve-out. *See infra* Part III.E.

112. *Madden*, 576 F.3d 957.

113. *Atkinson*, 658 F.3d 549.

114. *Dabit*, 547 U.S. at 87–88.

115. 15 U.S.C. § 77p(d)(1)(B) (1998).

A. THE CARVE-OUT'S "STATE LAW" REQUIREMENT

1. *The relevant "issuer"*

The carve-out covers claims based on the state law of "the issuer." Generally, determining which entity is the relevant issuer is a simple task since the securities being litigated are typically issued by the named defendant. However, the determination can be troublesome in extraordinary circumstances, especially in cases involving multiple defendants.

For example, in *Madden*, shareholders of St. Joseph Medical Corporation ("St. Joseph") and Orange Coast Managed Care Services ("Orange Coast") brought a state law class action against an investment bank for alleged misrepresentation made in connection with the sale of both corporations to FPA Medical Management ("FPA").¹¹⁶ On motion to remand, the defendant argued that neither St. Joseph nor Orange Coast was the "issuer" for purposes of the carve-out because neither issued FPA's securities, which the court deemed "covered securities" under SLUSA's preclusion provision. The defendant reasoned that the carve-out's mention of "*the* issuer," rather than "*an* issuer," suggested that the carve-out was limited to claims involving the issuer of the "covered securities."¹¹⁷

The Ninth Circuit disagreed, relying primarily on plain language considerations. "[T]he plain language of [the carve-out] allows a shareholder to bring a covered class action under state law against *any* 'issuer' that has made certain communications regarding the sale of its 'securities,' and that these securities need not be the 'covered securit[ies]' referred to in [the preclusion clause]"¹¹⁸ (emphasis added). The court added that the "public debate" surrounding inclusion of the carve-out as an exception to SLUSA preclusion suggests that it was designed to preserve state law actions brought "in connection with extraordinary corporate transactions requiring

116. *Madden*, 576 F.3d at 961–62.

117. *Id.*

118. *Id.* (internal citations omitted).

shareholder approval, such as mergers and tender offers,” regardless of whether or not the corporation issued “covered securities.”¹¹⁹

At least one court has also suggested that there need not be only one relevant issuer. In *In re Metlife Demutualization Litigation*, plaintiffs against MetLife Co. in federal court sought to enjoin a similar class action in state court, arguing that the latter action was not covered by the carve-out because it alleged fraud by MetLife, Inc., an entirely distinct “issuer” incorporated in a different state than what was required for the carve-out.¹²⁰ The District Court for the Eastern District of New York found otherwise, holding that the class action in state court sufficiently alleged fraud by MetLife Co.¹²¹ Regardless, the court added, even if the action made claims against both MetLife Co. and MetLife, Inc., “the Delaware Carve Out does not indicate that there must be only one set of relevant shares. . . . [and] could apply to both MetLife Co. and MetLife, Inc. shares.”¹²²

2. “Based upon the statutory or common law” of the issuer’s state of incorporation

Once the court ascertains “the issuer” for purposes of the carve-out, plaintiffs must then establish that their claim is “based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity).” Courts have consistently held that, while the action must assert a claim based on the law of the issuer’s state of incorporation,¹²³ plaintiffs need not file that action within that state.¹²⁴

119. *Id.* at 971.

120. *In re Metlife Demutualization Litig.*, CV 00-2258(TCP)(AKT), 2006 WL 2524196, at *5 (E.D.N.Y. Aug. 28, 2006).

121. *Id.*

122. Metlife, *supra* note 120, at 6.

123. See e.g., *Madden*, 576 F.3d at 972 (holding that carve-out did not preserve claims in which relevant issuer that was incorporated in Delaware because claims were based on California law); *In re Stillwater Capital Partners Inc. Litig.*, 853 F. Supp. 2d 441, 462 (S.D.N.Y. 2012) (holding that carve-out did not preserve plaintiffs’ claims because issuer was incorporated in Bermuda); *Greaves v. McAuley*, 264 F. Supp. 2d 1078, 1083 (N.D. Ga. 2003) (holding that, because claims were based on Georgia law, carve-out preserved claims in which relevant issuer was a Georgia corporation but did not preserve claims in which issuer was a Maryland corporation).

However, if an action is filed outside the state of the issuer's incorporation, plaintiffs will likely bear the burden of invoking the law of that state.¹²⁵ Merely showing that the law of the state in which the claim is filed in provides a similar cause of action to the state law of the issuer's state of incorporation will not satisfy this burden.¹²⁶

Defendants have argued that the carve-out's legislative history suggests that the carve-out should apply only to suits filed within the relevant issuer's state of incorporation.¹²⁷ However, most courts have insisted that the lack of ambiguity within the carve-out's relevant text—namely, that an action must be “based upon” the law of the state of incorporation—counsels against an implicit venue limitation. As the District Court for the Southern District of California stated in *Gibson v. PS Group Holdings, Inc.*, “nothing in this language [is] susceptible to clarification or interpretation by either the House Conference or Senate Banking Committee Reports. Had Congress intended to impose a restriction on the venue of actions preserved by

124. See, e.g., *Huang v. Reyes*, No. C 07-5950 CRB, 2008 WL 648519, at *3–4 (N.D. Cal. Mar. 6, 2008) (preserving action filed in California state court based on Delaware law); *Indiana Elec. Workers Pension Trust Fund v. Millard*, 07 CIV. 172 JGK, 2007 WL 2141697, at *1 (S.D.N.Y. July 25, 2007) (preserving action filed in New York state court but based on Delaware law); *Rubery v. Radian Grp., Inc.*, Civ. No. 07-1068, 2007 WL 1575211, at *4 (E.D. Pa. May 31, 2007) (preserving action filed in Philadelphia small claims court but based on Delaware law); *Lewis v. Termeer*, 445 F. Supp. 2d 366, 373 (S.D.N.Y. 2006) (preserving action filed in New York state court but based on Massachusetts law); *Decristofaro v. May Dep't Stores Co.*, No. 4:05CV526-DJS, 2005 WL 1528260, at *3 (E.D. Mo. June 28, 2005) (preserving action filed in St. Louis City court but based on Delaware law); *Gibson v. PS Grp. Holdings, Inc.*, No. 00-CV-0372 W(RBV), 2000 WL 777818, at *5 (S.D. Cal. Mar. 8, 2000) (preserving action filed in California state court but based on Delaware law); *Lalondriz v. USA Networks, Inc.*, 54 F. Supp. 2d 352, 354, adhered to on reconsideration, 68 F. Supp. 2d 285 (S.D.N.Y. 1999) (preserving action filed in New York state court but based on Delaware law). In *Atkinson*, the Sixth Circuit held that the carve-out did not apply to the plaintiffs' claims but did so without opining on the fact that the claims were filed in Minnesota state court but based on the state law of Tennessee, where the defendant was incorporated.

125. *Madden*, 576 F.3d at 972 (“A plaintiff suing [a company incorporated outside of California] in a California court bears the burden of ‘invok[ing] the law of a jurisdiction other than California[.]’”).

126. *Madden*, *supra* note 125.

127. See S. REP. NO. 105-182, at 6 (1998) (“[T]he Committee expressly does not intend for suits excepted under this provision to be brought in venues other than in the issuer's state of incorporation”); H.R. REP. NO. 105-803, at n.2 (1998) (Conf. Rep.) (“It is the intention of the managers that the suits under this exception be limited to the state in which issuer of the security is incorporated”).

the Delaware carve-out, it could have done so in the language of the statute. This it did not do.”¹²⁸

B. THE CARVE-OUT’S “INVOLVES” REQUIREMENT

A claim must “involve” one of carve-out’s two central prongs (see Sections C and D below) to qualify for preservation. The reach of the carve-out pivots on how a court defines “involves”: A broad interpretation of “involve” would preserve more state-law actions, while a more rigid interpretation would have the opposite effect.

Until recently, most lower courts were willing to rely on the carve-out’s legislative history to construe “involves” broadly.¹²⁹ In *Lewis v. Termeer*, for instance, the District Court for the Southern District of New York preserved a class action alleging fraud after shareholders sold their shares as a part of defendants’ stock exchange program.¹³⁰ The defendant asserted that, because some plaintiffs tendered their shares on the public market, the claim did not consist of an “exclusive” transaction between the issuer and shareholders and therefore disqualified the entire action from preservation under the carve-out’s first prong.¹³¹ The court disagreed, instead focusing its analysis on the carve-out’s requirement that the action merely “involve” an exclusive transaction.¹³² Under a broad reading of “involves,” the action was still preserved even if not all relevant transactions were literally made “exclusively” between the issuer and shareholders.¹³³ The court reasoned that its construction of “involves” was supported by a Congressional report describing deference to relief under state law.¹³⁴

128. *Gibson*, 2000 WL 777818, at *6.

129. *See, e.g., Millard*, 2007 WL 2141697, at *5 (noting that lower courts have construed the carve-out consistently with its broad language); *In re Metlife Demutualization Litig.*, 2006 WL 2524196, at *6 (finding that the “definition of ‘involve’ is quite broad, indicating that a number of securities may be purchased or sold”).

130. *Termeer*, 445 F. Supp. 2d at 372.

131. *Id.* *Termeer* arguably could have been decided differently had the court focused its analysis on the term “exclusively” rather than the term “involves,” especially considering other precedent defining on the former.

132. *Id.*

133. *Id.* at 373.

134. *Id.* at 372–73 (citing S. REP. NO. 105-182, at 6 (1998)).

In *Atkinson*, however, the Sixth Circuit took an entirely separate understanding of Congressional intent when it dismissed a class action filed by mutual fund shareholders alleging state-law fraud against the funds' issuer after their shares dropped in value.¹³⁵ The court first held that the plaintiffs were merely "holders" of a security and thus did not satisfy the carve-out's first prong, which requires "a purchase or sale of securities."¹³⁶ As in *Termeer*, the plaintiffs contended that, even if they held their securities during the alleged fraud, the claim still *involved* the purchase or sale of securities under the broader reading of "involves" suggested by legislative history.¹³⁷ However, unlike *Termeer*, the Sixth Circuit dismissed this theory as the "faulty senate-report argument."¹³⁸

The *Atkinson* court framed its analysis of the carve-out with the "more important SLUSA story," one in which Congress enacted SLUSA to ensure that certain class actions were governed by uniform standards or precluded altogether.¹³⁹ Under this microscope, the court rejected plaintiffs' attempt to analogize the term "involves" to the phrase "in connection with," which had been construed broadly by the Supreme Court in *Dabit*.¹⁴⁰ "The difference between these terms is quite significant, because 'in connection with' is a statutorily significant term of art," even prior to *Dabit*.¹⁴¹ The Sixth Circuit reasoned that Congress was likely aware of this broad construction when it included "in connection with" within SLUSA's preemption provision but excluded it from the carve-out, implying that Congress intended for a more limited scope for the latter.¹⁴²

C. THE CARVE-OUT'S FIRST PRONG

A class action must "involve" conduct categorized in at least one of the carve-out's two subsections to qualify for preservation. The

135. *Atkinson*, 658 F.3d at 557.

136. *Id.* at 553–54.

137. *Id.* at 553.

138. *Id.* at 554.

139. *Atkinson*, 658 F.3d at 557.

140. *Id.*

141. *Id.*

142. *Id.*

first subsection—sometimes referred to as “the first Delaware carve-out”—exempts actions that involve (1) “the purchase or sale of securities by the issuer or an affiliate of the issuer” that are (2) “exclusively from or to holders of equity securities of the issuer.”¹⁴³ This prong effectively preserves shareholder claims alleging fraud with respect to buy-back transactions.¹⁴⁴

1. “Purchase or sale of securities by the issuer”

To qualify for preservation under this prong, plaintiffs must first establish that a “purchase or sale of securities by the issuer or an affiliate”¹⁴⁵ was made. The “purchase or sale” requirement is troublesome for holder claims, i.e., claims in which plaintiffs are shareholders but neither sold nor purchased securities during the alleged misconduct. This was the case in *Atkinson*, in which shareholders of various mutual funds alleged that they *would* have sold their shares if not for material omissions in the funds’ disclosures.¹⁴⁶ The Sixth Circuit again relied on plain language considerations in distinguishing “purchasing or selling” securities from merely “holding” securities, as the plaintiffs had done.¹⁴⁷

Although the plaintiffs argued that the funds’ obligation to redeem their shares amounted to a “contract to purchase,” the Sixth Circuit found that an already-acquired “contract to purchase” still was not an “infinitely extending ‘purchase’ under the carve-out.”¹⁴⁸ At best, plaintiffs’ theory “transform[ed] Plaintiffs not from holders into purchasers, but . . . into different types of holders—holders of

143. 15 U.S.C. § 78bb(f)(3)(A)(i) (2014).

144. O’Hare, *supra* note 16, at 503.

145. SLUSA defines “affiliate” as “a person that directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.” 15 U.S.C. § 78bb(5)(A) (2014). See e.g., *In re Metlife Demutualization Litig.*, 2006 WL 2524196, at *6 (finding that a wholly owned subsidiary is an “affiliate” of the relevant issuer for purposes of the carve-out).

146. *Atkinson*, 658 F.3d at 553.

147. *Id.* See also *Crimi v. Barnholt*, C 08-02249 CRB, 2008 WL 4287566, at *3 (N.D. Cal. Sept. 17, 2008) (plaintiffs’ claims that arise merely from their decision to “hold” the issuer’s stock was not preserved under the carve-out).

148. *Id.*

‘contracts to purchase.’”¹⁴⁹

2. “*Exclusively from or to*” equity holders

Even if a court finds that a purchase or sale of securities was made, plaintiffs must still persuade the court that the purchase or sale was made “exclusively” from the issuer to equity holders. The inclusion of the term “exclusively” in this portion of the carve-out generally disqualifies any action involving any public transaction, such as a public offering. Accordingly, courts have generally adopted a literal, more rigid interpretation of the term “exclusively,” precluding any action in which transaction at issue was made in the open market.¹⁵⁰ As the District Court for the Western District of Louisiana held in *G.F. Thomas Investments, L.P. v. Cleco Corp.*, “only when shares of stock are purchased or sold to a limited market (that of the corporation’s current shareholders) will the [first] Delaware carve-out provision apply. When the stock is offered to the open market, SLUSA governs the prospective class action.”¹⁵¹ In *Cleco*, plaintiffs argued that “exclusively” was not transaction-specific and instead applied to the relevant parties in the dispute.¹⁵² Under this theory, the requirement would have been satisfied because the class was comprised “exclusively” of the defendant’s shareholders.¹⁵³

149. *Id.*

150. See, e.g., *G.F. Thomas Investments, L.P. v. Cleco Corp.*, 317 F. Supp. 2d 673, 685 (W.D. La. 2004), *aff’d sub nom.* *GF Thomas Investments LP v. Cleco Corp.*, 123 F. App’x 155 (5th Cir. 2005) (plaintiffs’ allegations of defendant’s false and misleading official statements and SEC filings did not involve an offer “exclusive” to existing shareholders); *Zoren v. Genesis Energy, L.P.*, 195 F. Supp. 2d 598, 604 (D. Del. 2002) (plaintiffs’ claim that defendants made material misrepresentations and omissions regarding two public offerings because the offerings involved a purchase or sale to prospective shareholders, not “exclusively from or to” existing shareholders); *Burekovitch v. Hertz*, 01-CV-1277 (ILG), 2001 WL 984942, at *6 (E.D.N.Y. July 24, 2001) (plaintiffs’ claim against president who pledged 40 of the company’s shares as collateral did not involve a purchase or sale “exclusive” to existing shareholders). But see *Termeer*, 445 F. Supp. 2d at 372 (action was preserved under the carve-out even though some class members tendered their shares on the open market); *In re Metlife*, 2006 WL 2524196, at *6 (action fell within the carve-out even though some of the shares of relevant issuer were issued to the public).

151. *Cleco*, 317 F. Supp. 2d at 682.

152. *Id.*

153. *Id.*

The court dismissed this novel interpretation in favor of dictionary definitions of the term “exclusive”—a common theme in carve-out jurisprudence.¹⁵⁴

D. THE CARVE OUT’S SECOND PRONG

A claim may also involve conduct described in the carve-out’s second subsection—also known as “the second Delaware carve-out”—to qualify for preservation. The second subsection preserves claims involving (1) “any recommendation, position, or other communication with respect to the sale of securities of the issuer” that is (2) “made by or on behalf of the issuer or an affiliate of the issuer” to equity holders,” and (3) concerns equity holders’ decisions “with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters’ or appraisal rights.”¹⁵⁵

The carve-out’s second prong contains more ambiguous terms and phrases than the first prong. Although narrowly designed to preserve shareholder claims alleging fraud in connection with an issuer’s tender offer, exchange offer, or merger, the second prong contains open-ended terms like “communication,” “on behalf of,” and “with respect to.”¹⁵⁶ Unsurprisingly, different courts have construed these terms both in favor of and against plaintiffs arguing for preservation.

1. “Any recommendation, position, or other communication with respect to the sale”¹⁵⁷ of securities of the issuer”

Courts have interpreted “any recommendation, position, or other communication” to include a broad variety of statements made by issuers. Most frequently, these “communications” are company

154. *Id.* at 681–85.

155. 15 U.S.C. § 78bb(f)(3)(A)(ii) (2014).

156. O’Hare, *supra* note 16, at 503.

157. The definition of a “sale” of securities for purposes of the carve-out has not been litigated. However, for the Supreme Court’s definition of a “sale” of securities in other contexts, see *Sec. & Exch. Comm’n v. Nat’l Sec., Inc.*, 393 U.S. 453, 469 (1969).

proxy statements.¹⁵⁸ However, courts have also previously found press releases,¹⁵⁹ information booklets,¹⁶⁰ financial statements,¹⁶¹ and “fairness opinions”¹⁶² to satisfy this requirement, regardless of whether or not the communication was addressed to the plaintiffs specifically.

In *Rubery v. Radian Group, Inc.*, for instance, shareholders of a financial services company alleged that corporate directors and officers breached their fiduciary duties by improperly agreeing to a merger under Delaware law.¹⁶³ On motion to remand, the District Court for the Eastern District of Pennsylvania held that the company’s press release announcing the merger to the public was a “communication” within the meaning of the carve-out, even if the announcement was released publicly.¹⁶⁴ The court appeared to focus its analysis on the issuer’s intent in the communication. As the court explained, “[a]lthough Defendants issued the press release to the general public, [and not to shareholders in particular,] they plainly wrote it to encourage Radian’s shareholders to approve the proposed merger.”¹⁶⁵

158. Actions alleging fraudulent proxy statements that are preserved by the carve-out typically involve proxy statements that recommend shareholder votes on either backdated stock options or company mergers. See, e.g., *Walker v. Bolt Tech. Corp.*, No. 3:14-CV-01406 MPS, 2014 WL 7404762, at *4 (D. Conn. Nov. 3, 2014); *Weitman v. Tutor*, 588 F. Supp. 2d 133, 139 (D. Mass. 2008); *Huang*, 2008 WL 648519, at *6; *Crimi*, 2008 WL 4287566, at *3; *Pace v. Bidzos*, Nos. C 07-3742 PJH, C 07-3332 PJH, 2007 WL 2908283, at *2 (N.D.Cal. Oct.3, 2007); *Millard*, 2007 WL 2141697 at *4; *City of Ann Arbor Employees’ Ret. Sys. v. Gecht*, No. C-06-7453 EMC, 2007 WL 760568 at *6 (N.D.Cal. Mar.9, 2007); *Superior Partners v. Chang*, 471 F. Supp. 2d 750, 754 (S.D. Tex. 2007); *Gibson*, 2000 WL 777818 at *5; *Derdiger v. Tallman*, 75 F. Supp. 2d 322, 325 (D. Del. 1999). But cf. *Fisher v. Kansas*, 487 F. Supp. 2d 270, 280–81 (E.D.N.Y. 2007), aff’d 288 F. App’x 721 (2d Cir. 2008) (carve-out does not cover misrepresentations within proxy statements regarding executive compensation).

159. See, e.g., *Rubery*, 2007 WL 1575211, at *5–6; *Alessi v. Beracha*, 244 F. Supp. 2d 354, 359 (D. Del. 2003); *Greaves*, 264 F. Supp. 2d at 1083.

160. *In re Metlife*, 2006 WL 2524196, at *6.

161. *Lazar v. Gregerson*, No. C 02-0652 SI, 2002 WL 535405, at *3 (N.D. Cal. Apr. 8, 2002).

162. *Madden*, 576 F.3d at 972.

163. *Rubery*, 2007 WL 1575211, at *1.

164. *Rubery*, 2007 WL 1575211, at *5–6.

165. *Id. Contra Drulias v. Ade Corp.*, CIV.A. 06-11033 PBS, 2006 WL 1766502 (D. Mass. June 26, 2006) (holding that alleged misrepresentation in preliminary proxy statement was not a “communication” within the carve-out because it was not communicated to shareholders, but filed with the SEC as required by statute). However, numerous courts have found *Drulias* to be wrongly decided. See *City Trading Fund v. Nye*, 46 Misc. 3d 1206(A) (N.Y. Sup. Ct. 2015);

2. “*Made by or behalf of the issuer or an affiliate of the issuer*” to equity holders

In actions against an issuer, proving that the allegedly fraudulent communication was indeed made *by* the issuer directly is typically an uncomplicated task. Courts have consistently found that communications by directors, officers, and other high-level management are at least made “on behalf of” the issuer for purposes of the carve-out.¹⁶⁶ However, against a non-issuer party, plaintiffs naturally have a higher burden in establishing that the defendant made the communication “on behalf of” the issuer or that the party is otherwise “an affiliate”¹⁶⁷ of the issuer.

Madden provided the clearest guidance on these terms while adopting a broad interpretation of “on behalf of.” More specifically, the Ninth Circuit concluded that this portion of the carve-out “refers to an individual or entity that makes a communication to an issuer’s stockholders *in the interest of*, as a representative of, or for the benefit of the issuer.”¹⁶⁸ As explained above, shareholders of St. Joseph and Orange Coast alleged that an investment bank misled shareholders in a “fairness opinion” that recommended the sale of both corporations to FPA.¹⁶⁹ The Ninth Circuit agreed with the plaintiffs’ argument that the bank’s fairness opinion was sufficiently

Chang, 471 F. Supp. 2d at 754–55.

166. See, e.g., *Nickell v. Shanahan*, ED99163, 2013 WL 2402852, at *6 (Mo. Ct. App. June 4, 2013) (registration statement signed by the relevant issuer’s CEO recommending shareholders to approve a merger was sufficiently “on behalf of” the issuer); *Millard*, 2007 WL 2141697, at *9 (claims against the issuer as well as directors and officers of the issuer preserved under the carve-out); *Chang*, 471 F. Supp. 2d at 759 (claims against the issuer as well as directors and officers of the issuer preserved under the carve-out).

167. SLUSA defines “affiliate” as “a person that directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.” 15 U.S.C. § 78bb(5)(A) (2014). See, e.g., *In re Metlife*, 2006 WL 2524196, at *6 (finding that a wholly owned subsidiary is an “affiliate” of the relevant issuer for purposes of the carve-out’s first subsection).

168. *Madden*, 576 F.3d at 973. See, e.g., *Nickell*, 2013 WL 2402852, at *6 (relying on *Madden*’s construction of “on behalf of”).

169. *Madden*, 576 F.3d at 961–62.

“on behalf of” St. Joseph and Orange Coast, eschewing a literal interpretation that would limit “on behalf of” to insiders employed by the issuer.¹⁷⁰ Management from both issuers had formed a Special Committee that retained the bank “for the purpose of determining whether the transaction was fair” and that ultimately approved the merger in reliance of the bank’s recommendation.¹⁷¹ Because the bank’s fairness opinion was made at least “in the interest of” the issuer, it satisfied the “on behalf of” requirement for purposes of the carve-out.¹⁷²

3. “Concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters’ or appraisal rights”

Plaintiffs arguing for preservation under the second prong must also show that the relevant “communication” concerned decisions made by equity holders “with respect to” voting, acting in response to an offer, or exercising their dissenters’ or appraisal rights.¹⁷³ The second prong’s reach thus hinges on how a court defines “with respect to,” similarly to how the carve-out as a whole hinges on the “involves” requirement discussed in Section B. Unlike the Sixth Circuit’s interpretation of “involves” in *Atkinson*, however, courts have appeared more willing to construe “with respect to” broadly to preserve more actions under the carve-out.¹⁷⁴

In *City of Ann Arbor Employees’ Retirement System v. Gecht*, for example, the District Court for the Northern District of California equated “with respect to” to “in connection with,” interpreted

170. *Id.* at 972–73.

171. *Id.* at 973.

172. *Id.*

173. Actions alleging communications that concern equity holder decisions with respect to voting securities or acting in response to a tender or exchange offer typically involve shareholder approval of either backdates stock options or company mergers. *See* cases cited *supra* notes 104–08.

174. *See, e.g., Gecht*, 2007 WL 760568, at *4–7 (proxy statements seeking shareholder approval of backdating stock options sufficiently concerned decisions “with respect to” voting of securities); *Millard*, 2007 WL 2141697, at *6–7 (reaching the same holding as *Gecht* for purposes of the carve-out).

liberally by the Supreme Court in *Dabit* and by other circuit courts prior to the *Dabit* decision.¹⁷⁵ In *Gecht*, the court considered the plaintiffs' allegations against the issuer for fraudulent proxy statements seeking shareholder authorization of backdated stock options.¹⁷⁶ In finding that the action fell under the carve-out's scope, the court ultimately adopted the Ninth Circuit's construction of "in connection with" in *Falkowski v. Imation Corp.*, which ruled that a statement is "in connection with" a securities transaction if it is at least "more than tangentially related" to the transaction.¹⁷⁷ Plaintiffs sufficiently alleged "more than a 'tangential' relationship between Defendants' allegedly fraudulent communications to shareholders and the prospective sale of securities at issue (i.e., stock option grants)" to qualify for preservation.¹⁷⁸

E. REMAND OF AN ACTION PRESERVED BY THE DELAWARE CARVE-OUT

A federal court must remand a class action's claim back to state court once the judge finds that it qualifies for preservation under the carve-out.¹⁷⁹ However, courts have disagreed on whether the carve-out requires actions that are *partially* preserved by the carve-out—i.e., only some of the plaintiffs' claims qualify for carve-out preservation—be remanded in their entirety. The District Court for the Northern District of Georgia decided that actions with some preserved claims be remanded in their entirety, reasoning that SLUSA's statutory language suggests that federal courts are required to remand the entire case to state court.¹⁸⁰ More specifically, under

175. *Gecht*, 2007 WL 760568, at *4–7.

176. *Id.* at *1.

177. *Id.* at *4–7 (citing *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129–30 (9th Cir. 2002)).

178. *Id.* at *7.

179. *Greaves*, 264 F. Supp. 2d at 1083 ("The Delaware carve-out preserves, and requires this court to remand, certain 'covered class action[s].'").

180. *Greaves*, 264 F. Supp. 2d at 1086. *See also Chang*, 471 F. Supp. 2d at 754–55 (concluding that a court must either dismiss or remand the entire action). Other SLUSA-related cases have suggested that plaintiffs' claims are severable, and that only SLUSA only requires dismissal of proper claims. However, none of these cases specifically adjudicated on the scope of remand under the carve-out. *See, e.g., White v. Lord Abbett & Co. (In re Lord Abbett Mut. Funds Fee Litig.)*, 553 F.3d 248, 256 (3d. Cir.2009); *Falkowski*, 309 F.3d at 1128–32.

SLUSA's sequencing of analysis in its text, the court was required to first determine if removal of the action was appropriate pursuant to SLUSA's removal provision and then determine if any statutory exception preserved jurisdiction in state court.¹⁸¹ If an exception did apply, SLUSA stipulated, "the Federal court shall remand *such action* to such State court."¹⁸² After deciding that "all doubts about jurisdiction should be resolved in favor of remand to state court," the court ordered to remand all claims even if it found that only some of the plaintiffs' claims were preserved by the carve-out and other claims were otherwise dismissible under SLUSA preclusion.¹⁸³

V. CRITICAL ANALYSIS OF THE CARVE-OUT

This survey of case law above highlights an overarching question courts regularly face when deciding the carve-out's applicability: exactly how far into state law did Congress intend to go? This tension manifests itself in how courts approach the carve-out's broad statutory language. Courts more willing to dismiss an action frequently adopt the approach adopted in *Atkinson*, in which the Sixth Circuit interpreted the carve-out within the "more important SLUSA story," i.e., Congress's prophylactic preclusion of certain state law class actions. On the other hand, courts more willing to preserve an action under the carve-out are likely to adopt the deferential approach displayed in *Madden* and *Termeer*. Both cases emphasized Congress's express reticence to intruding on state law causes of action.

Below, this article argues that courts should adopt the more deferential approach espoused in cases like *Madden* and *Termeer*. Particularly in light of post-SLUSA developments in Delaware and federal law, the risks associated with carve-out's preclusive effect have become more alarming, while the justifications for SLUSA preclusion are not as pronounced.

181. *Greaves*, 264 F. Supp. 2d at 1084-85.

182. *Id.* at 1085.

183. *Id.* at 1086.

A. *MALONE V. BRINCAT*

The belief that Congress avoided sensitive federalism issues by adopting the carve-out into SLUSA was short-lived. The carve-out was modeled on decades of relatively well-settled Delaware law on the fiduciary duty of disclosure, which generally only applied when a director or officer requested shareholder action. However, less than a month after SLUSA was enacted, the Delaware Supreme Court disrupted its own rule when it decided *Malone v. Brincat*.¹⁸⁴ The *Malone* court abandoned the shareholder action limitation, widely expanding the duty of disclosure so that it was no longer coextensive with the carve-out.

The *Malone* opinion itself can inform critiques of the carve-out. In *Malone*, shareholders of a publicly traded company alleged that directors violated their fiduciary duty of disclosure by making false SEC filings and distributing false financial statements to shareholders.¹⁸⁵ The Chancery Court dismissed these claims because directors had not requested any shareholder action.¹⁸⁶ In a surprising departure from established precedent, the Delaware Supreme Court reversed the Chancery Court's dismissal. Regardless of whether a shareholder action is requested, the Court held, "directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty."¹⁸⁷

Importantly, the Supreme Court in *Malone* recognized the potential overlap of the decision with federal securities law, acknowledging its historical deference to "the panoply of federal protections that are available to investors in connection with the purchase or sale of securities."¹⁸⁸ The *Malone* shareholders, however, had neither purchased nor sold their shares, rendering those federal protections unavailable. As such, the Court declined to defer to federal regulation and ruled that "[w]hen directors communicate

184. *Malone*, 722 A.2d 5.

185. *Id.* at 8.

186. *Malone v. Brincat*, Del. Ch., C.A. No. 15510, 1997 WL 697940, at *2 (Oct. 30, 1997).

187. *Id.* at *9.

188. *Malone*, *supra* note 186, at *13.

publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty."¹⁸⁹

1. *Revisiting the Carve-Out after Malone*

The carve-out's language thus became outdated the minute *Malone* was handed down. After *Malone*, fiduciary duty of disclosure claims that do *not* involve a request for shareholder action are cognizable under Delaware law. However, such claims are still at risk of SLUSA preclusion since the carve-out's text assumes a shareholder action requirement, as was the case for decades prior to *Malone*. The carve-out thus falls short of its intended coverage, leaving actions that do not involve a request for shareholder action vulnerable to SLUSA preclusion, even if there is a clear case of breach of fiduciary duty.

As such, some have convincingly argued that Congress should amend the carve-out to correctly align with Delaware's post-*Malone* fiduciary duty of disclosure.¹⁹⁰ While a Congressional amendment to the carve-out would be a decisive fix, even the most optimistic critics must admit that compelling Congress to agree to such a meticulous fine-tuning of a savings clause like the carve-out is wishful thinking.

Instead, as the survey of carve-out-related case law above suggests, federal courts may serve as the more effective forum for updating the carve-out. Courts need not transform their understanding of the carve-out wholesale, but can instead rely on traditional principles of legislative intent. As detailed in Section D, the record supporting the carve-out strongly indicates a Congressional intent to preserve state regulation of the fiduciary duty of disclosure. The carve-out was designed to cover claims actionable under the Delaware fiduciary duty of disclosure. *Malone* simply represents the governing standard for the fiduciary duty of disclosure under state law updated after SLUSA was enacted.

189. *Id.* at *10. The Court remanded and permitted plaintiffs to replead. *Id.* at *15. Notably, however, if an identical action was pleaded with the same facts after *Dabit*, it would likely be removed to federal court and dismissed under SLUSA. *Dabit* ruled that such "holder" claims are not outside SLUSA's preemptive scope. *Dabit*, 547 U.S. at 78.

190. See O'Hare, *supra* note 16, at 508.

Therefore, in deference to Congressional intent, courts interpreting the carve-out should be more willing to preserve state law claims cognizable under *Malone*. For instance, a court deciding a close question of the carve-out's applicability to a certain action can broadly define the "involves" requirement—as the *Termeer* court did—or adopt an expansive approach of the two shareholder action prongs—as the *Madden* court did.

B. *CHADBOURNE & PARKE LLP v. TROICE* AND THE DECLINE OF SECURITIES FRAUD CLASS ACTION FILINGS

Since SLUSA's enactment, the U.S. Supreme Court has elaborated SLUSA's preclusive provision twice. As discussed above, in *Dabit*, the Supreme Court adopted an expansive reading of SLUSA's preclusion provision, giving significant weight to SLUSA's express mandate to preclude state law class actions from frustrating the PSLRA's objectives. Under this approach, SLUSA even barred actions not traditionally regulated by securities law (i.e., holder claims). Since *Dabit*, litigators and scholars have contemplated exactly how far SLUSA reached into state law under such a broad interpretation.

More recently, however, the Supreme Court has been more willing to impose limits on SLUSA's preclusive reach. In *Chadbourne & Parke LLP v. Troice*, the Court found that a state law class action against companies that allegedly engaged in the infamous Allen Stanford Ponzi scheme was not precluded by SLUSA because the alleged fraud was not made "in connection with" a transaction of "covered security," as required under SLUSA's preclusion provision.¹⁹¹ Investors bringing the action were allegedly induced by defendants to purchase a bank's certificates of deposit, which are not the type of nationally traded securities that qualify as a "covered security." The Court rejected the defendants' argument that the alleged fraud was made at least "in connection with" transactions of covered securities since the certificates of deposit were backed by the bank's holdings of covered securities.

191. *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1066 (2014).

Troice is relevant to an interpretation of the carve-out because it sets forth the Supreme Court's newfound disinclination to allow *more* state-law class actions in spite of SLUSA preclusion. *Troice* was not decided in a vacuum. As Justice Breyer himself, writing for the majority, recognizes, the Court has historically interpreted "in connection with" broadly and flexibly, as was the case in *Dabit*. By reading "in connection with" narrowly and deviating from well-settled precedent (the focal point of Justice Kennedy's dissent), *Troice* should signal to lower courts that the era of broad SLUSA preclusion is dwindling. Decisions like the Sixth Circuit's conclusion that preservation under the carve-out is outweighed by the supposedly "more important SLUSA story" of state law preemption holds less weight in the wake of *Troice*. On the other hand, a broad reading of the carve-out's language adheres to *Troice*'s new approach to SLUSA.

SLUSA preclusion is also less justifiable in light of stark drop in federal securities fraud class action filings in recent years. Such filings reached a sixteen-year record low of 152 filings in 2012.¹⁹² In 2014, there were no filings with alleged investor losses of greater than five billion dollars for the first time since 1997 and settlement dollars for securities actions hit their lowest point since 1998.¹⁹³ These statistics hardly warrant the same concerns of "vexatious litigation" and baseless lawsuits that necessitated the enactment of the PSLRA and SLUSA in the mid 1990s. With these issues largely removed, federal courts should be less convinced to preclude state law remedies under SLUSA.

V. CONCLUSION

192. CORNERSTONE RESEARCH, Securities Class Action Filings: 2012 Year in Review (2013), *available at* <https://www.cornerstone.com/GetAttachment/81e1daa9-7a2e-4589-9dd6-a443950b0837/Securities-Class-Action-Filings—2012-Year-in-Review.pdf>.

193. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2014 YEAR IN REVIEW (2015), *available at* http://online.wsj.com/public/resources/documents/2015_0127_cornerstone.pdf; Press Release, Cornerstone Research, Total Settlement Dollars for Securities Class Actions Hit 16-Year Low According to New Cornerstone Research Report (Mar. 24, 2015), *available at* <http://www.marketwatch.com/story/total-settlement-dollars-for-securities-class-actions-hit-16-year-low-according-to-new-cornerstone-research-report-2015-03-24>.

As this article illustrates, courts interpreting the Delaware carve-out are forced to weigh two distinct goals made explicit by Congress when it enacted SLUSA. First, in an effort to prevent plaintiffs from avoiding the PSLRA's stringent requirements, Congress sought to preempt certain securities-related state law class actions altogether. Second, in deference to state regulation of director and officer fiduciary duties, Congress also carved out state law claims based upon the fiduciary duty of disclosure from SLUSA preemption.

The broad statutory language that comprises both SLUSA's preclusion provision and the carve-out effectively gives a court discretion in deciding which of these Congressional objectives will color its analysis when deciding the carve-out's scope. This article contends that, in light of legal and empirical developments since SLUSA's enactment, courts should be wary of precluding state law actions that could conceivably be preserved under the carve-out. Courts should consistently construe the carve-out as a symbol of Congressional deference to state regulation of corporate law. Failure to do so puts the carve-out at risk of being a defunct limitation on federal encroachment onto state territory.
